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## TAN SRI DATO' DR ROZALI ISMAIL v. KETUA PENGARAH/ KETUA HAKIM SYARIE, JABATAN KEHAKIMAN SYARIAH MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID WAN SALLEH J
B [JUDICIAL REVIEW NO: WA-25-248-07-2021]
21 JANUARY 2022

**Abstract** – *The applicant's application for leave for judicial review challenging the decision of the Jabatan Kehakiman Syariah Malaysia in refusing to direct a judge to take conduct of the continued trial of a nusyuz summons did not go against art. 121(1A) of the Federal Constitution as it was not a challenge against a decision made on the question of Islamic law. It was in fact an administrative decision and there was an element of public law in the decision. Taking into account that an aggrieved person has a right to seek the court's supervisory powers over decision-makers and ought not to be shut out summarily, this applicant's leave application concerning claims that his constitutional rights to a fair trial had been infringed was not at all frivolous or vexatious.*

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***ADMINISTRATIVE LAW:*** *Judicial review – Leave – Application for – Application to quash Jabatan Kehakiman Syariah Malaysia's decision in refusing to direct judge to take conduct of continued trial of nusyuz summons – Whether decision made on question of Islamic law – Whether application went against art. 121(1A) of Federal Constitution – Whether decision administrative decision based on s. 128 of Syariah Court Civil Procedure (Federal Territories) Act 1998 – Whether there was element of public law – Whether there was infringement of applicant's constitutional right to fair trial – Whether issues to be determined at leave stage – Whether application frivolous*

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This was a leave application for judicial review. The applicant filed a summons at the Kuala Lumpur Syariah Subordinate Court ('MRS Kuala Lumpur') against his second wife, Justynn Cassandra ('Justynn') under s. 59 of the Islamic Family Law (Federal Territories) Act 1984 for *nusyuz* ('the *nusyuz* summons'). Subsequently, Justynn filed an application at the MRS Kuala Lumpur for an order for confirmation of divorce ('the first divorce summons'). When the *nusyuz* summons came up for mention, the presiding judge, Tuan Izzat Syazli ('Tuan Izzat') ordered that the first divorce summons to be disposed of first. He also ordered for the hearing of the *nusyuz* summons to be stayed. Aggrieved by the said order, the applicant filed an application for review at the Kuala Lumpur Syariah High Court ('MTS Kuala Lumpur'), which was allowed. MTS Kuala Lumpur also made a consequential order for the *nusyuz* summons to be heard and disposed of first

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before another judge. Pursuant to the said direction by the MTS Kuala Lumpur, the *nusyuz* summons was heard before Tuan Saifullah Hamzah ('Tuan Saifullah'). In the meantime, the divorce summons was heard and dismissed. What was left to be disposed of was the *nusyuz* summons. The trial went on before Tuan Saifullah and the applicant proceeded to close his case. At the trial, Justynn applied for her to be supplied with the notes of evidence, which was refused by Tuan Saifullah. Dissatisfied with the ruling, she applied for the MTS Kuala Lumpur to review the same ('the second review application'). Tuan Saifullah was then transferred to the Prosecution Division of the Attorney General's Chambers ('AGC'). The conduct of the *nusyuz* summons was taken over by Tuan Hizwan Mohamed ('Tuan Hizwan') but the continued trial was adjourned pending the outcome of the second review application. However, before the continued trial could proceed, Tuan Hizwan too was transferred out and replaced by another judge, Tuan Rosdi Hanapi ('Tuan Rosdi'). The applicant made an application to Tuan Rosdi for Tuan Saifullah to continue hearing the case, but this was refused on the ground that Tuan Saifullah had no *locus standi* to do so. The applicant then sought for the trial to be adjourned to enable him to apply to recuse Tuan Rosdi, who was the presiding judge in a subsequent divorce proceeding filed by Justynn at the MRS KL ('the second divorce proceedings'). The applicant then applied to the putative first respondent to direct Tuan Saifullah to resume hearing and eventually determine the *nusyuz* summons. By a letter ('the impugned letter'), the putative first respondent dismissed the applicant's application for Tuan Saifullah to continue taking conduct of the trial of the *nusyuz* summons. The decision of the putative first respondent was now the subject matter of this judicial review. The applicant sought, *inter alia*, for an order of *certiorari* to quash the putative first respondent's decision in refusing to direct Tuan Saifullah to take the conduct of the continued trial of the *nusyuz* summons. The applicant further sought an order of *mandamus* against the putative first respondent to compel the latter to issue a direction for Tuan Saifullah to resume taking conduct of the *nusyuz* summons until its final determination. The Attorney General ('AG'), in objecting to this application for leave, submitted that the putative first respondent's decision and the second divorce proceedings were not amenable to judicial review. It was further contended that by virtue of art. 121(1A) of the Federal Constitution ('FC'), the proceedings before and decisions made by Syariah courts could not be reviewed by the civil High Courts.

**Held (granting application for leave):**

**(1)** The applicant was not challenging any 'decision' made by the respondents on the question of Islamic law. In fact, except for the first divorce summons, which was not the subject matter of this judicial review, there was no decision made on the question of Islamic law as yet in either the *nusyuz* summons or the second divorce proceedings. Thus, the issue of whether this application of judicial review went against art. 121(1A) of the FC did not arise. In any event, the case of

A *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* held that the amendment inserting cl. (1A) in art. 121 of the FC does not oust the jurisdiction of the civil courts nor did it confer judicial power on the Syariah courts. (paras 24 & 25)

B **(2)** The Chief Registrar, acting on behalf of the putative first respondent, had made it clear that the putative first respondent had made an administrative decision, affirming the ruling of Tuan Rosdi. It was clear from the impugned letter that the first respondent had made an administrative decision based on s. 128 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. There was an element of
C public law in the decision when the impugned letter made a specific reference to s. 128 of the Act. (para 26)

**(3)** As to the second divorce proceedings, the applicant had raised a pertinent question whether Tuan Rosdi could preside in both the *nusyuz* summons and the second divorce proceedings without violating the
D applicant's constitutional rights to a fair trial under art. 5(1) of the FC. The fact that Tuan Rosdi presided in both of the said proceedings might or might not jeopardise a fair trial. This was not for the court to determine at this leave stage. (paras 27 & 28)

E **(4)** The applicant had come to this court raising the red flag and claimed that the putative respondents had infringed his constitutional right to a fair trial. He felt aggrieved. Whether he was right or wrong would not be determined at this stage. But this court could not stand idle. Borrowing the words of the learned judge in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* that 'an aggrieved person in such
F circumstances has a right to seek the courts' supervisory powers over decision-makers and ought not to be shut out summarily,' the AG had failed to show to this court that this leave application was frivolous so as to justify its dismissal *in limin*e. (paras 30 & 31)

G **Case(s) referred to:**

*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC* ***(refd)***

*Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Bank Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC* ***(refd)***

*Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC* ***(refd)***
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*Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC* ***(refd)***

*Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors [2011] 2 CLJ 165 CA* ***(refd)***

*R v. Inland Revenue Commissioners Ex Parte National Federation of Employed and Small Businesses Ltd [1982] AC 617 HL* ***(refd)***
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*Syarifah Nooraffyzza Wan Hosen v. Director Of Jabatan Agama Islam Sarawak & Ors [2018] 3 CLJ 620 CA* ***(refd)***

*Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2018] 2 CLJ 762 CA* ***(refd)***

**Legislation referred to:**
Administration of Islamic Law (Federal Territories) Act 1993, s. 51(1)
Federal Constitution, arts. 5(1), 121(1A)
Islamic Family Law (Federal Territories) Act 1984, s. 59
Rules of Court 2012, O. 53 r. 3(3)
Syariah Court Civil Procedure (Federal Territories) Act 1998, s. 128

*For the applicant - Gopal Sri Ram, Abdul Razak Muhidin, Fadzilah Pilus, Lim Choon Khim, Chin Yan Leng, David Yii Hee Kiet & Yasmeen Soh; M/s CK Lim Law Chambers*
*For the respondent - Ahmad Hanir Hambaly & Mohammad Sallehuddin Md Ali; DPPs*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Wan Ahmad Farid Wan Salleh J:**

**[1]** This is a leave application for judicial review.

**[2]** On 4 May 2017, the applicant filed a summons at the Kuala Lumpur Syariah Subordinate Court ("MRS Kuala Lumpur") against his second wife, Justynn Cassandra binti Mohamad Firdaus ("Justynn"), under s. 59 of the Islamic Family Law (Federal Territories) Act 1984 for *nusyuz* ("the *nusyuz* summons").

**[3]** Barely two weeks after the filing of the *nusyuz* summons by the applicant, Justynn filed an application at the MRS Kuala Lumpur for an order for confirmation of divorce ("the first divorce summons").

**[4]** When the *nusyuz* summons came up for mention on 11 September 2017, the presiding judge, Tuan Izzat Syazli bin Murshid ("Tuan Izzat"), ordered that the first divorce summons to be disposed of first. He also ordered for the hearing of the *nusyuz* summons be stayed. Aggrieved by the said order, the applicant filed an application for review at the Kuala Lumpur Syariah High Court ("MTS Kuala Lumpur").

**[5]** The applicant's review application was allowed by the MTS Kuala Lumpur. It made a consequential order for the *nusyuz* summons to be heard and disposed of first before another judge.

**[6]** Pursuant to the said direction by the MTS Kuala Lumpur, the *nusyuz* summons was heard before another judge, Tuan Saifullah bin Hamzah ("Tuan Saifullah").

**[7]** In the meantime, the divorce summons was heard and dismissed on 4 June 2018.

**[8]** What is left to be disposed of is the *nusyuz* summons. The trial went on before Tuan Saifullah and by 3 October 2019, the applicant had closed his case. At the trial, Justynn applied for her to be supplied with the notes

of evidence, which Tuan Saifullah refused. Dissatisfied with the said ruling, she applied for the MTS Kuala Lumpur to review the same ("the second review application").

**[9]** On 4 October 2019, Tuan Saifullah was transferred to the prosecution division of the Attorney General's Chambers ("AGC"). The conduct of the *nusyuz* summons was taken over by Tuan Hizwan bin Mohamed Nor ("Tuan Hizwan"), but the continued trial was adjourned pending the outcome of the second review application. However, before the continued trial could proceed, Tuan Hizwan too was transferred out and replaced by another judge, Tuan Rosdi bin Hanapi ("Tuan Rosdi").

**[10]** The applicant made an application to Tuan Rosdi for Tuan Saifullah, who by then was already stationed at the AGC, to continue hearing the case. Tuan Rosdi refused the application on the ground that Tuan Saifullah had no *locus standi* to do so.

**[11]** In the circumstances, Tuan Rosdi proceeded to preside the continued trial on 3 November 2020 and 6 January 2021 with Justynn as the first witness for the defence. During the cross-examination of Justynn, the applicant's counsel had sought for the trial to be adjourned to enable him to apply to recuse Tuan Rosdi. According to the applicant, Tuan Rosdi was the presiding judge in a subsequent divorce proceedings filed by Justynn at the MRS Kuala Lumpur ("the second divorce proceedings").

**[12]** The applicant then applied to the putative first respondent to direct Tuan Saifullah to resume hearing and eventually determine the *nusyuz* summons. By a letter dated 14 April 2021 ("the impugned letter"), the putative first respondent dismissed the applicant's application for Tuan Saifullah to continue taking conduct of the trial of the *nusyuz* summons.

**The Judicial Review**

**[13]** The decision of the putative first respondent as contained in the impugned letter is now the subject matter of this judicial review.

**[14]** In this application for judicial review, the applicant seeks *inter alia* for an order of *certiorari* to quash the putative first respondent's decision in refusing to direct Tuan Saifullah to take the conduct of the continued trial of the *nusyuz* summons. The applicant further seeks an order of *mandamus* against the putative first respondent to compel the latter to issue a direction for Tuan Saifullah to resume taking conduct of the *nusyuz* summons until its final determination.

**[15]** As is the requirement under O. 53 r. 3(3) of the Rules of Court 2012 ("ROC"), a copy of this application was lodged in the Attorney General's Chambers ("AGC").

**The Objection By The Attorney General**

**[16]** The Attorney General ("AG") objects to this application for leave.

**[17]** The basis of the AG's objection are grounded on two main issues. They are that the putative first respondent's decision as stated in the impugned letter and the second divorce proceedings are not amenable to judicial review.

**[18]** The AG's position is that the putative first respondent's decision was purely administrative in nature and not made under any statutory law. The putative first respondent was only reiterating a decision made by Tuan Rosdi on 3 November 2020 for the latter to continue with the conduct of the *nusyuz* summons. The learned SFC submitted that not every decision made by the authoritative body is suitable for judicial review. According to the learned SFC, since there is no public element in the decision made in the impugned letter, such a decision is not amenable to judicial review; *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 FC.

**[19]** In any event, the learned SFC argued, the power under s. 128 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 is only exercisable by the presiding judge. If the applicant was dissatisfied with the decision of Tuan Rosdi, it is always open, according to the learned SFC, for the applicant to apply for a review to the MTS Kuala Lumpur under s. 51(1) of the Administration of Islamic Law (Federal Territories) Act 1993.

**[20]** The same applies to the proceedings at the Syariah courts, which according to the learned SFC, are not amenable to judicial review. Quoting the judgment of the Court of Appeal in *Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors* [2011] 2 CLJ 165; [2012] 3 MLJ 694 CA, the learned SFC submitted that it is not for the civil court to go behind any order of the Syariah court and say whether it had acted correctly or otherwise.

**[21]** The learned SFC also raised a jurisdictional issue of this court. My attention was drawn to art. 121(1A) of the Federal Constitution, which states that this court, being a High Court in Malaya, shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. According to the learned SFC, an example of the application of art. 121(1A) can be seen in the Supreme Court case of *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1 SC.

**[22]** It is therefore the contention of the learned SFC that by virtue of art. 121(1A) of the Federal Constitution, the proceedings before and decisions made by Syariah courts cannot be reviewed by the civil High Courts; *Syarifah Nooraffyzza Wan Hosen v. Director Of Jabatan Agama Islam Sarawak & Ors* [2018] 3 CLJ 620; [2018] 2 MLJ 354 CA.

**[23]** For the aforesaid reasons, the learned SFC had urged this court not to grant the leave as sought by the applicant.

**Analysis**

**[24]** I take cognisance of learned counsel for the applicant's argument that the applicant is not challenging any "decision" made by the respondents on the question of Islamic law. In fact, except for the first divorce summons, which is not the subject matter of this judicial review, there is no decision made on the question of Islamic law as yet in either the *nusyuz* summons or the second divorce proceedings.

**[25]** Since the applicant is not challenging any decision on a question of Islamic law, the issue of whether this application of judicial review goes against art. 121(1A) of the Federal Constitution does not arise. In any event, the Federal Court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 FC held that the amendment inserting cl. (1A) in art. 121 of the Federal Constitution does not oust the jurisdiction of the civil courts nor did it confer judicial power on the Syariah courts.

**[26]** The applicant is challenging the decision made by the Chief Registrar in the impugned letter. Is the decision in the impugned letter a judicial decision or an administrative decision? With respect, in my considered view, the Chief Registrar, acting on behalf of the putative first respondent, had made it clear that the putative first respondent had made an administrative decision, affirming the ruling of Tuan Rosdi on 3 November 2020. It says *inter alia*, as follows:

> Walau pun begitu, suatu tindakan wajar telah dibuat secara pentadbiran bagi mengenal pasti status kes tersebut dan mendapati bahawa pada 03 November 2020, kes ini disebut bagi sambung bicara di hadapan Hakim bicara baru iaitu Tuan Rosdi Hanapi.

It was clear from the impugned letter that the first respondent had made an administrative decision which he said was based on s. 128 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. With respect, I cannot, therefore, accept the argument of the learned SFC that there was no element of public law in the decision when the impugned letter made a specific reference to s. 128 of the Act.

**[27]** As to the second divorce proceedings, the applicant has raised a pertinent question whether Tuan Rosdi could preside in both the *nusyuz* summons and the second divorce proceedings without violating the applicant's constitutional rights to a fair trial under art. 5(1) of the Federal Constitution.

**[28]** The fact that Tuan Rosdi presides in both of the said proceedings might or might not jeopardise a fair trial. That is not for me to determine at this leave stage. I will not embark on substantial issues on merit at this stage. Ajaib Singh J in delivering the judgment of the Supreme Court in *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Bank Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; [1990] 3 MLJ 228 SC held that:

> In his grounds of judgment, the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

**[29]** What is required at this stage is for this court to make a quick perusal of the material in order to ascertain that the application is not frivolous or vexatious. Lord Diplock, in his speech at the House of Lords in *R v. Inland Revenue Commissioners Ex Parte National Federation of Employed and Small Businesses Ltd* [1982] AC 617 HL remarked as follows:

> If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

**[30]** The applicant has come to this court raising this red flag and claims that the putative respondents have infringed his constitutional right to a fair trial. He felt aggrieved. Whether he is right or wrong will not be determined at this stage. But this court cannot stand idly by since to borrow the words of Varghese JCA in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2018] 2 CLJ 762; [2015] MLJU 2268 CA "an aggrieved person in such circumstances has a right to seek the courts' supervisory powers over decision-makers and ought not to be shut out summarily".

**[31]** The AG has failed to show to this court that this leave application is frivolous so as to justify its dismissal *in limine*.

**[32]** The application for leave is hereby granted with no order as to costs.